

Denise A. Dragoo (0908)
James P. Allen (11195)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Telephone: 801-257-1900
Facsimile: 801-257-1800

FILED

JUN 13 2011

**SECRETARY, BOARD OF
OIL, GAS & MINING**

Kevin N. Anderson (0100)
Jason W. Hardin (8793)
FABIAN & CLENDENIN
215 South State, Suite 1200
Salt Lake City, Utah 84111
Telephone: 801-531-8900
Facsimile: 801-596-2814

**BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**In the Matter of the Petition of Genwal
Resources, Inc., for Review of Division
Order 10-A, Crandall Canyon Mine**

**GENWAL'S RESPONSE TO THE
DIVISION'S MOTION TO MODIFY
DIVISION ORDER 10-A**

**REPLY MEMO IN SUPPORT OF
MOTION TO CONTINUE**

Docket No. 2010-026

Cause No. C/015/0032

Genwal Resources, Inc., permittee of the Crandall Canyon Mine ("**Permittee**" or "**Genwal**"), Permit No. C/015/0032, by and through its counsel of record, respectfully submits this response to the Division of Oil, Gas and Mining's (the "**Division's**") Motion to Modify Division Order 10-A. Genwal also replies to the Division's apparent opposition to Genwal's Motion to Continue the hearing in this matter.

ARGUMENT

I. GENWAL TAKES NO POSITION AND WAIVES NO RIGHTS REGARDING THE DIVISION'S PLANS TO AMEND THE DIVISION ORDER

Genwal believes that the Division is within its authority to rescind, modify, or reissue Division Order 10-A (“**DO 10-A**”) so long as the due process rights of Genwal are preserved under the Utah Coal Program. Pursuant to Utah Admin. R. 645-303-212, the Division may by order require a reasonable permit change pursuant to R645-303-200. Genwal has no objection to the requested Board Order granting leave to amend DO 10-A. In declining to object, however, Genwal waives no procedural or substantive rights to dispute the modified order. Pursuant to R645-303-213, any order of the Division requiring a permit change is subject to administrative and judicial review under R645-303-200. Following issuance of the modified order, Genwal reserves the right to provide supplemental briefing and argument as necessary to address the Division’s authority to compel the proposed bonding actions.

II. THE DIVISION’S REQUEST FOR EVIDENTIARY HEARING IN ADVANCE OF A DECISION OF THE UNDERLYING LEGAL ISSUES UNLAWFULLY CONTRAVENES ITS APPROVED STIPULATION

Genwal understands that, if the Board grants leave to amend DO 10-A, the Division will join in its request to continue the proceedings in this matter to the August Board hearing. Whether the hearing is scheduled in June or August, and contrary to Genwal’s request, the Division now urges the Board to proceed with an evidential hearing on the nature of water discharge BEFORE ruling on whether the requirement for long-term bonding is lawful. Regardless of whether the Division now believes its case is more effectively presented in that manner, the suggestion to do so is contrary to its stipulation filed in this matter on October 21,

2010 and the Board's Prehearing Order dated October 27, 2010, providing that this matter "shall proceed as set forth in that stipulation" (emphasis added). The Division has agreed to proceed in a distinct phased process whereby the legal issues are resolved before the technical issues are heard. Parties are bound by their stipulations unless relieved by the court. *Yeargin Inc. v. Auditing Div'n*, 2001 UT 11, ¶ 19. The binding effect of stipulations is equally applicable to administrative adjudications. *Id.* Where a stipulation has been entered into freely, with advice of counsel, a tribunal should be hesitant to set it aside. *Id.* at ¶ 21.

In this matter, the Division stipulated, through counsel, on October 20, 2010 to resolve the four underlying legal challenges to the Division Order before addressing the technical issues. Stipulation to an Order Regarding Pre-Hearing Procedures and the Nature of the December Board Hearing, ¶ 1 (filed Oct. 21, 2010) ("**Stipulation**"). The Board approved the Stipulation on October 27, 2010, ordering that the "matter shall proceed" as set forth in the Stipulation which was "made a part of the Order." Utah Bd. of Oil, Gas & Mining, Pre-Hearing Order, Docket No. 2010-026 (Oct. 27, 2010). The Stipulation specifically deferred all issues requiring an evidentiary hearing, "including but not limited to, the likelihood of a perpetual discharge requiring treatment and the amount of a bond or other financial assurance to cover treatment costs." Stipulation, ¶ 4. These issues were deferred pending resolution of the legal issues to be briefed and heard on December 8, 2010. Stipulation, ¶ 5. The parties were to determine the need for additional discovery, expert analysis, and hearings only "[f]ollowing the Board's issuance of its Order on the issues presented and arguments at the December Board hearing." Stipulation, ¶ 6.

The Division's arguments for an immediate evidentiary hearing, offered at the May Board Hearing and again in its Response to Genwal's Motion to Continue, contravene these stipulated provisions and should be rejected. Genwal is entitled to rely upon the Board Prehearing Order and the Division's Stipulation, and neither the Board nor the Division is free to deviate from that agreed-upon procedure. If the parties are unable to reach a settlement Genwal requests that the Board enter a ruling on the legal issues briefed and argued in accordance with the Prehearing Order. Should the Board rule in favor of Genwal and dismiss DO 10-A, the further evidentiary hearing will not be required. Adherence to the Board's Prehearing Order and promotion of judicial economy outweighs the Division's "preference" for presenting the technical issues prior to a ruling on the legal issues.

III. THE DIVISION HAS NOT DISPUTED THAT GOOD FAITH EXISTS OF CONTINUING THE PROCEEDINGS

It appears that all parties have agreed to continue the evidentiary hearing to August, 2011; however, the Division has also offered to proceed with this hearing in June, 2011. Genwal seeks a continuance beyond the June 22, 2011, hearing because it cannot effectively conduct discovery or otherwise prepare for the evidentiary hearing sought by the Division in the time allotted. Genwal needs additional time to conduct discovery due to the unavailability of its key hydrologic expert for depositions, report drafting, and hearing preparation in the month of June. Genwal promptly advised the Division of this circumstance and requested its agreement to a continuance, and filed the subject Motion when the Division refused. In its current response, the Division takes no issue with any of these circumstances. Accordingly, Genwal respectfully requests that it be granted the continuance requested in its Motion.

CONCLUSION

By Order and Stipulation, the Board and Division have agreed that the Board should first enter a ruling on the pending legal issues in this matter before proceeding with an evidentiary hearing. This approach was agreed upon to avoid the cost and burden of an evidentiary hearing should the Board dismiss this matter based on the legal briefs and argument presented by the parties in January, 2011. The Division has not demonstrated that good cause exists for it to be relieved of its Stipulation deferring such a hearing until the legal arguments have been ruled upon by the Board. The Division is bound by its earlier agreement and the Board's Prehearing Order to proceed in that manner, and has improperly sought to hasten the process for its own purposes. The Division's preference for presenting technical evidence in any hearing while the legal issues are still pending must yield to its stipulated agreement and the Board's Prehearing Order. Genwal respectfully requests, therefore, that its Motion to Continue be granted in full.

Respectfully submitted this 14th day of June, 2011.

BY:  

ATTORNEYS FOR GENWAL RESOURCES, INC.

SNELL & WILMER, L.L.P.

Denise A. Dragoo

James P. Allen

FABIAN & CLENDENIN

Kevin N. Anderson

Jason W. Hardin

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **GENWAL'S RESPONSE**
TO THE DIVISION'S MOTION TO MODIFY DIVISION ORDER 10A and REPLY
MEMO IN SUPPORT OF MOTION TO CONTINUE were ~~hand~~ delivered on June ^{via email} 9th,
A

2011, to the following:

Steve Alder, Esq.
Emily Lewis, Esq.
Assistant Attorneys General
Utah State Attorney General
1594 West North Temple
Salt Lake City, Utah 84116

Michael S. Johnson, Esq.
Assistant Attorney General
Utah State Attorney General
1594 West North Temple
Salt Lake City, Utah 84116

Julie Ann Carter
Secretary to the Board
1594 West North Temple
Salt Lake City, Utah 84116

